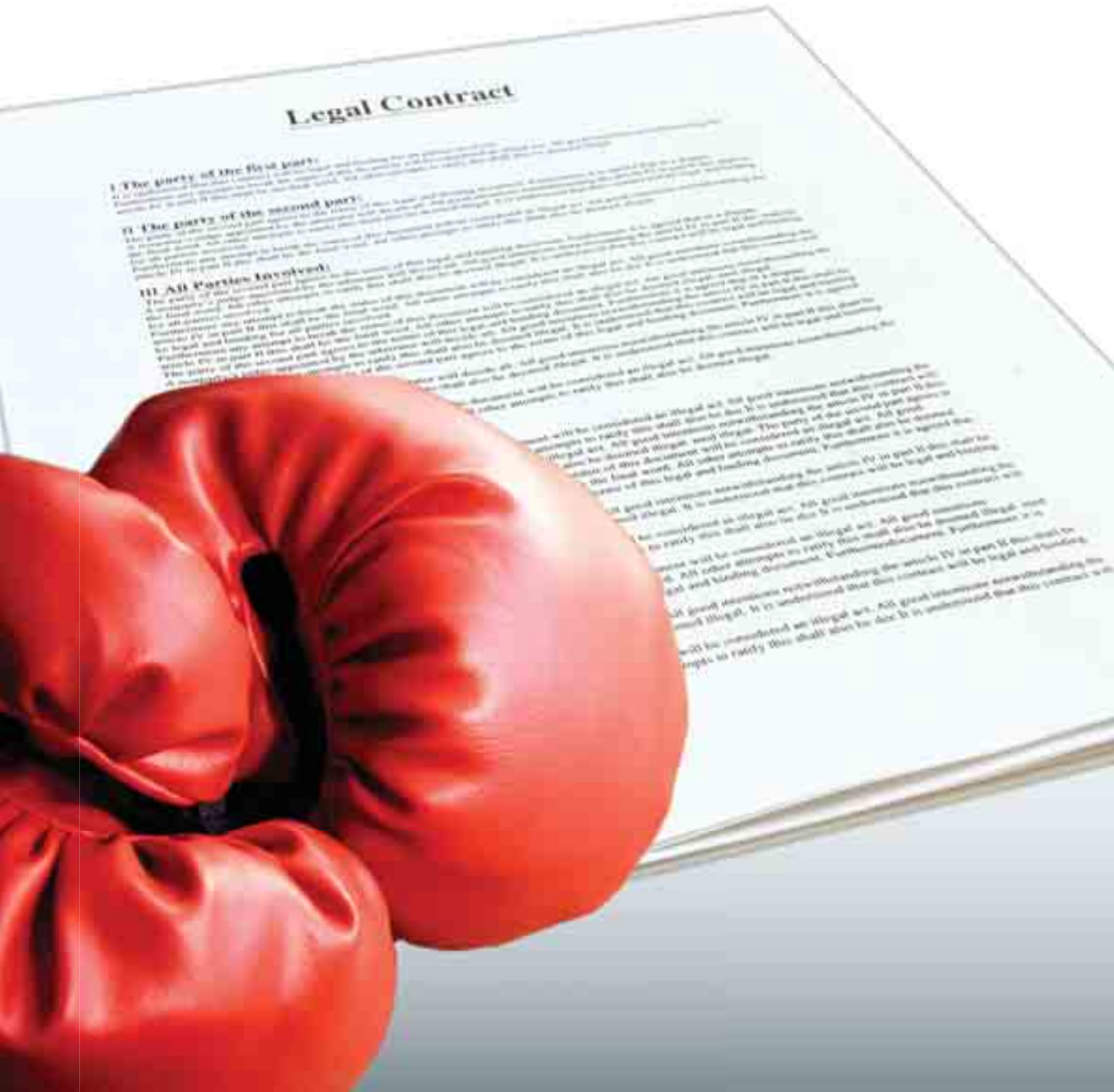


Explaining the Australian Consumer Law

Stage one of the Australian Consumer Law includes a number of important provisions. The proposed law is before the Australian Parliament. Here is a layman's guide to the proposed law.





Knocking unfairness out of the fine print

Ever wondered what you were signing when buying a mobile phone or hiring a car?

The proposed Australian Consumer Law deals with unfair contract terms in standard form consumer contracts, by defining what 'unfair' means and what a court must consider when determining whether a contract term is unfair. Compliance with these provisions will give consumers greater confidence when signing standard form contracts.

(See page 18 of this publication for a full description of this provision.)

Civil pecuniary penalties

Civil pecuniary penalties are currently not available for contraventions of consumer protection provisions.

When a contravention occurs, the Australian Competition and Consumer Commission can only seek to obtain a fine through criminal proceedings, which are appropriate in only a small number of matters.

However, under this new provision, a court will be able to order a person to pay a civil pecuniary penalty for a contravention, or attempted contravention, of:

- unconscionable conduct
- unfair practices (other than misleading and deceptive conduct)
- pyramid selling
- failure to respond to a substantiation notice
- providing false or misleading information in response to a substantiation notice
- certain product safety and product information provisions.

The maximum penalty under this provision is up to \$1.1 million for a company or up to \$220 000 for an individual.

Disqualification orders

On application by the ACCC, a court will be able to disqualify a person from managing corporations for a period it considers appropriate.

Disqualification orders are already a well-recognised enforcement tool under the *Corporations Act 2001* (Cwlth). They have been introduced into the *Trade Practices Act 1974* to deal with certain breaches of the anti-competitive conduct provisions.

Disqualification orders may be particularly useful when addressing problems that arise with 'repeat offenders' in breaches of consumer law.

“On application by the ACCC, a court will be able to disqualify a person from managing corporations for a period it considers appropriate.”

In some circumstances, disqualification orders may be appropriate for directors who fail to take steps to ensure the accuracy of their advertising claims, those who fail to ensure that products they sell or produce comply with mandatory product safety standards, and those who deliberately set out to mislead or deceive consumers.

Infringement notices

Under the new law, an infringement notice could be issued by the ACCC for breaches of consumer protection provisions and to deal more efficiently with smaller matters warranting a regulatory response.

Infringement notices provide an opportunity for a party to pay a penalty and finalise a dispute, or not to pay and to contest the merits of the alleged breach.

If a person does not pay an infringement notice penalty, the ACCC may take action for the underlying alleged contravention of the Trade Practices Act.

Under the proposed law, the ACCC can only issue one infringement notice per person for each alleged contravention of an infringement notice provision, including:

- unconscionable conduct
- certain unfair practices
- pyramid selling
- the ACL, which at this stage comprises prohibited unfair contract terms
- certain product safety and product information provisions
- failure to respond to a substantiation notice, or
- providing false or misleading information in response to a substantiation notice.

An infringement notice must be issued within 12 months after the alleged contravention occurred.

A maximum penalty of \$6600 applies to corporations for breaches of parts V and IVA of the Act and product safety provisions.

(Continued on page 10)

Explaining the Australian Consumer Law—continued

Substantiation power to check claims

It is proposed that the Australian Consumer Law will provide the ACCC with a new investigative power—the substantiation notice.

The notices can be used in a variety of circumstances, including:

- **two-part advertising claims**—such as ‘Was/Now’ pricing and strikethrough advertising (many advertisements carry a previous price and then a current price—sometimes the previous price is bogus)
- **business opportunities**—such as projected earnings
- **food claims**—such as place of origin, composition claims, health claims
- **environmental claims**—such as biodegradability, carbon emission impacts
- **product safety claims**—such as meeting a prescribed standard that requires testing.

Under the proposed law, penalties for failing to respond may be up to \$16 500 for a corporation and \$3300 for an individual.

Essentially, the notices give people 21 days to ‘substantiate’ their claims about the:

- supply of goods or services by a corporation
- sale or grant of an interest in land by a corporation, or
- employment offers by a corporation.

Under the proposed law, penalties for failing to respond may be up to \$16 500 for corporations and \$3300 for individuals. Providing false or misleading information or documents attracts a penalty of up to \$27 500 for corporations and \$5500 for individuals.

The introduction of the substantiation notice will complement the ACCC’s existing investigative powers.

Currently, the ACCC may compulsorily require information where it has reason to believe that a person can furnish information about a matter that constitutes or may constitute a contravention of the Act.

The ‘reason to believe’ threshold may in some cases prevent the ACCC from obtaining information, particularly during the early stages of an investigation, about public claims made by traders.

For example, in a coordinated investigation by consumer protection agencies regarding two-price advertising (‘Was/

Now’ pricing), some state and territory agencies issued substantiation notices in the early stages of their investigation of claims made by traders.

During this initial stage of the investigation, the ACCC, however, was able to request information only on a voluntary basis because it did not believe that it had a sufficient basis on which to issue a compulsory notice.

Using a substantiation notice may allow the ACCC to undertake an initial review quickly and efficiently.

Public warning powers

Public warning powers are also set to be part of the Australian Consumer Law. At times in consumer market regulation, a rapid warning to the community is the best way of protecting it.

Product safety warnings can be issued under s. 65B of the Trade Practices Act. For example, last year the Minister for Competition Policy and Consumer Affairs issued a warning about the potential risks to small children from personal fitness treadmill machines.

The proposed public warning power will be widened, allowing the ACCC to issue public warnings when, on reasonable grounds, it suspects a contravention of the unconscionable conduct, consumer protection or ACL provisions; where someone is likely to suffer detriment from the conduct; and where it is in the public interest.

Redress for non-party consumers

The ACCC’s ability to obtain redress for consumers under the Trade Practices Act has significant limitations.

The Federal Court of Australia’s decision in *Cassidy v Medibank Private Ltd* placed constraints on the ACCC’s ability to obtain compensation for consumers not named in proceedings.

Under the proposed changes, the ACCC will be empowered to deal more efficiently with matters that affect multiple consumers, by being able to seek orders for redress for those consumers not party to the action.

The proposed changes will bring the commission into line with international legal developments.

For example, consumers in the United States, on whose behalf the US Federal Trade Commission may seek orders—including equitable relief, restitution, recession of contracts and other remedial orders—are not required to be party to the actions taken.

And under New Zealand’s Fair Trading Act, a court can make compensatory orders for a person whether or not they are party to the proceedings, or where it finds the person has suffered loss or damage as result of the contravening conduct.